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3 **FOR PUBLICATION**
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6 UNITED STATES BANKRUPTCY COURT
7 NORTHERN DISTRICT OF CALIFORNIA

8 In re Case No. 00-52653-JRG
9 SUSIE RYDER, Chapter 13
10 Debtor.
11 _____/

12 DAVID A. BOONE, dba LAW OFFICE Adversary Proceeding No.04-5114
13 OF DAVID A. BOONE,

14 vs. Plaintiff,
15

16 SUSIE RYDER,
17 Defendant.
18 _____/

19 **MEMORANDUM OPINION**

20 **I. INTRODUCTION**

21 Defendant Susie Ryder completed a Chapter 13 plan in this court
22 and was granted a discharge. Thereafter her attorney, David Boone,
23 filed suit against her in state court for unpaid attorney fees. The
24 action was removed to this court and Boone filed a summary judgment
25 motion. The principal issue before the court is whether Boone can
26 pursue additional attorney fees in state court or whether such
27 unapproved fees were discharged at the conclusion of Ryder's Chapter
28 13 case.¹ For the reasons hereafter stated the court concludes that

¹ In order to control costs both parties agreed that the Court could address the discharge issue through plaintiff's summary judgment motion.

1 the unapproved fees were discharged.

2 **II. FACTUAL BACKGROUND**

3 On May 16, 2000, Boone and Ryder entered into a fee agreement
4 regarding her Chapter 13 case. The agreement provided:

5 All fees are payable only after court approval and then fees are
6 payable through your Chapter 13 Plan by the Trustee.

7 The following day, May 17th, Ryder's Chapter 13 petition was
8 filed. Ryder's plan was thereafter confirmed on January 22, 2001,
9 with the confirmation order being entered on February 7, 2001.

10 At the time of confirmation Boone was awarded \$1,600 in attorney
11 fees. This award was based on a long standing practice in this court,
12 as well as many others, regarding guideline fees in Chapter 13 cases.
13 In this court two separate documents are involved.

14 The first is an agreement entitled *Rights and Responsibilities*
15 *Of Chapter 13 Debtors And Their Attorneys*. This agreement was signed
16 by both Boone and Ryder.² The purpose of this agreement is to ensure
17 that both attorney and client are clear as to what particular
18 responsibilities each has and what each party can expect from the
19 other. Regarding attorney fees, the *Rights and Responsibilities*
20 agreement provides:

21 If the initial fees ordered by the court are not sufficient to
22 compensate the attorney for legal services rendered in the case,
23 the attorney further agrees to apply to the court for any
24 additional fees. Fees shall be paid through the plan unless
otherwise ordered. The attorney may not receive fees directly
from the debtor other than the initial retainer.

25 If the debtor disputes the legal services provided or the fees
26 charged by the attorney, an objection may be filed with the
court and the matter set for hearing.

27 ² The *Rights and Responsibility* agreement was developed in San Jose but has since been
28 adopted by many courts throughout the country.

1 The *Rights and Responsibilities* agreement ties into the court's
2 *Guidelines For Payment Of Attorney's Fees In Chapter 13 Cases*. Where
3 the agreement has been signed and filed, and where there are no
4 objections to the fees established by the court's *Guidelines*, such
5 fees will be approved at the time of confirmation of the plan without
6 the attorney having to file a fee application. It is by this
7 procedure that Boone was awarded \$1,600 in fees at confirmation.

8 As set forth in the *Rights and Responsibilities* agreement, an
9 attorney may seek additional fees during the course of the Chapter 13
10 case. On July 3, 2002, Boone filed an interim fee application, which
11 was approved. Boone was granted additional fees in the amount of
12 \$2,000. This application covered the period of May 16, 2000 through
13 July 2, 2002.³

14 Approximately five months later, on January 9, 2003, the Chapter
15 13 Trustee filed a Notice of Chapter 13 Plan Completion with the court
16 requesting that a discharge order be entered pursuant to § 1328(a) of
17 the Bankruptcy Code.⁴ The discharge order was entered on January 17,
18 2003. A month later, on February 18, 2003, the Trustee filed her
19 Final Report and Account. On February 27, 2003, a Final Decree was
20 entered and the case closed.

21 A year after the case was closed, on March 1, 2004, Boone sued
22 Ryder in state court seeking additional attorney fees in the amount
23 of \$6,280.67 plus interest and costs, which was removed to this court.

25 ³ When guideline fees are approved at confirmation and the attorney thereafter seeks
26 additional compensation, the court requires that fees from the inception of the case be
27 supported with time records.

28 ⁴ Unless otherwise noted, all section references are to the Bankruptcy Code, 11 U.S.C.
§ 101 *et seq.*

1 **III. DISCUSSION**

2 Ryder asserts that the additional attorney fees that Boone seeks
3 were discharged at the conclusion of her Chapter 13 case when she
4 received her discharge. Relatively little case law has developed on
5 this issue.⁵ However as will be discussed below, the court finds
6 persuasive the analysis set forth in In re Hanson, 223 B.R. 775
7 (Bankr. D. Or. 1998).

8
9 **A. Hanson's Analysis Leading To The Discharge Of Unapproved
Attorney Fees At The Conclusion Of The Case.**

10 Hanson involved Chapter 13 debtors who were billed for fees by
11 their attorney after obtaining their discharge. The bankruptcy court
12 was confronted with the issue of whether the attorney could collect
13 postconfirmation attorney fees after the discharge. The bankruptcy
14 court concluded that the postconfirmation fees were provided for in
15 the plan and thus were discharged on conclusion of plan payments.

16 The court reached its conclusion through a three step process.
17 First, the court reasoned that under § 330(a) of the Code, a debtor's
18 counsel is entitled to reasonable compensation for services rendered.⁶

19 _____
20 ⁵ See 4 Keith Lundin, Chapter 13 Bankruptcy, 3d Ed., § 359.1 (2004). Judge Lundin
21 discusses three cases which lead to his conclusion that whether or not attorney fees are
22 discharged is not always clear. The three cases are In re Gantz, 209 B.R. 999 (B.A.P. 10th
Cir. 1997), In re Hanson, 223 B.R. 775 (Bankr. D. Or. 1998), and Cornelison v. Wallace, 202
B.R. 991 (D. Kan. 1996).

23 ⁶ Section 330(a) provides:

24 (a)(1) After notice to the parties in interest and the United States Trustee and a
25 hearing, and subject to sections 326, 328, and 329, the court may award to a trustee,
26 an examiner, a professional person employed under section 327 or 1103- (A)
reasonable compensation for actual, necessary services rendered by the trustee,
examiner, professional person, or attorney and by any paraprofessional person employed
by any such person; and (B) reimbursement for actual, necessary expenses

27 (4)(B) In a chapter 12 or chapter 13 case in which the debtor is an individual, the
28 court may allow reasonable compensation to the debtor's attorney for representing the
interests of the debtor in connection with the bankruptcy case based on a

1 Second, § 1322(a)(2) provides that the plan shall provide for full
2 payment of claims entitled to priority under § 507 of the Code.
3 Finally, under § 507(a)(1) "administrative expenses allowed under
4 section 503(b) of this title" have priority.⁷ Section 503(b)(2)
5 provides that administrative expenses include "compensation and
6 reimbursement awarded under section 330(a) of this title"⁸ Thus,
7 the attorney fees were "administrative expenses." Hanson, 223 B.R.
8 at 778.

9 An important component of the analysis is the nature of a
10 particular district's Chapter 13 plan and the type of claims that are
11 included.⁹ As such, the court went on to discuss its procedures and
12 that, in its district, expenses of administration in a Chapter 13 case
13 had long been understood to include a debtor's attorney fees
14 throughout the case, including through the discharge. The court found
15 that consistent with §§ 330 and 503(b)(2) of the Code, the district's
16 local rules and forms had made express provision for supplemental fee
17 applications unless the debtor's counsel opted out of that system.

18
19 consideration of the benefit and necessity of such services to the debtor and the
20 other factors set forth in this section.

21 ⁷ Section 507(a)(1) provides:

- 22 (a) The following expenses and claims have priority in the following order:
23 (1) First, administrative expenses allowed under section 503(b) of this title, and
any fees and charges assessed against the estate under chapter 123 of title 28.

24 ⁸ Section 503(b)(2) provides:

- 25 (b) After notice and a hearing, there shall be allowed administrative expenses,
other than claims allowed under section 502(f) of this title, including...
26 (2) compensation and reimbursement awarded under section 330(a) of this title.

27 ⁹ Hanson qualified its decision by stating: "Not all courts allow debtors' counsel to
be paid through the Chapter 13 plan for attorney fees incurred postconfirmation. The
reasoning in this opinion applies only to cases in which the plan provides for payment of
28 postconfirmation fees." Hanson, 223 B.R. at 778 n.7.

1 Because postconfirmation attorney fees were treated as
2 administrative expenses, the plan's provision for payment of
3 administrative expenses included payment of those fees. In Hanson,
4 the fees billed after the discharge were never submitted to or
5 approved by the court. Therefore as administrative expenses, the fees
6 were discharged at the conclusion of the Chapter 13 case under
7 § 1328(a).¹⁰ Hanson, 223 B.R. at 778.

8 Hanson also concluded that attorney fees for services during a
9 Chapter 13 case are not postpetition claims under § 1305. Id. at 780.
10 The court rejected this argument because postconfirmation fees and
11 costs of debtor's counsel related to the Chapter 13 case are
12 administrative expenses, a specific category of postpetition debts
13 distinct from the more general types of consumer debts covered
14 by § 1305(a)(2).¹¹ The court further noted that the Chapter 13
15 discharge provisions contrast with a Chapter 7 discharge, which covers
16 only prepetition debts, and a Chapter 11 discharge, which covers debts
17 that arose before confirmation. Hanson, 223 B.R. at 778 (citing
18

19 ¹⁰ Section 1328(a) provides:

20 (a) As soon as practicable after completion by the debtor of all payments under the
21 plan, unless the court approves a written waiver of discharge executed by the
22 debtor after the order for relief under this chapter, the court shall grant the
debtor a discharge of all debts provided for by the plan or disallowed under
section 502 of this title

23 ¹¹ This is not the first case in which an attorney tried to argue that their fees fell
24 under this provision. In In re Phillips, 219 B.R. 1001 (Bankr. W.D. Tenn. 1998), the attorney
25 argued that postconfirmation fees were allowable under § 1305. The court concluded that
26 there was no indication that Congress intended routine legal work by the debtor's attorney
27 to be within the purview of § 1305. Id. at 1007. In addition, allowing attorneys to use
28 § 1305(a)(2) as a procedural vehicle for their compensation was fraught with potential
problems since neither the judge, creditors, nor the client would have a meaningful notice
of the claims nor meaningful opportunity to object. Id. at 1008. The court concluded that
the more appropriate procedure for approval of postpetition attorney fees and expenses in
Chapter 13 cases is an application for the court's approval under § 330 and Rule 2016. Id.
at 1009.

1 §§ 727(b) and 1141(d) of the Code).

2 Finally, Hanson rejected counsel's argument that the application
3 for supplemental compensation is discretionary. The court found this
4 argument to be the equivalent of the argument raised by creditors who
5 contend that their claims are not provided for in the Chapter 13 plan
6 if they do not file a proof of claim. In the Ninth Circuit, this
7 argument has been rejected because "provided for" means that "the plan
8 makes a provision for the claim or deals with the claim or refers to
9 the claim - not that the claim was actually paid." Id. at 779
10 (citations omitted).

11 **B. A Review Of This District's Treatment Of Attorney Fees In**
12 **Chapter 13 Cases Demonstrates That Such Fees Are**
13 **Administrative Expenses Included In The Plan And Thus**
Unapproved Fees Are Discharged At The Conclusion Of The
Case.

14 As in Hanson, in this district attorney fees have long been paid
15 through the Chapter 13 plan, unless otherwise ordered by the court.
16 The plan confirmed in this case provided:

17 2. From the payments so received, the Trustee shall make
18 disbursements as follows:

19 (a) To the expenses of administration required by 11 U.S.C.
20 § 507(a)(1) in deferred payments.

21 Consistent with this practice, the *Rights and Responsibilities*
22 agreement, which was signed by both Boone and Ryder and attached to
23 the order confirming the plan, provided that fees are to be paid
24 through the plan unless otherwise ordered and that the attorney could
25 not receive fees directly from the debtor other than the initial
26 retainer. In recognition of this long standing practice, Boone's fee
27 agreement provided that all fees were payable only after court
28 approval and that they would be paid through the Chapter 13 plan.

1 Similar to an argument raised in Hanson, Boone argues that his
2 fee agreement with Ryder allowed for the payment of fees outside of
3 bankruptcy. Boone refers to the provision that states: "[u]nder
4 normal circumstances, such additional fees will be paid through the
5 Client's Chapter 13 after the court has considered and approved the
6 fees by application by attorney." However, this argument ignores the
7 terms of the *Rights and Responsibilities* agreement, which states that
8 the attorney may not receive fees directly from the debtor other than
9 the initial retainer. As Boone's fee agreement refers to the *Rights*
10 *and Responsibilities* agreement it must be interpreted in a similar
11 fashion.

12 None of the arguments that Boone presents addresses the language
13 of the statutes and rules which require court approval of attorney
14 fees. The cases Boone cites in support of the right to sue for
15 unapproved fees are distinguishable.¹²

16 "Experienced bankruptcy counsel are well aware of the limitations
17 of 11 U.S.C. § 330 on compensation and the possibility that their fee
18 requests may be reduced or disallowed." In re Gantz, 209
19 B.R. 999, 1002 (B.A.P. 10th Cir. 1997)(citation omitted). Although
20 § 330(a)(4)(B) provides that the court "may" allow reasonable
21 compensation to a debtor's counsel in a Chapter 13 case, "the
22 Bankruptcy Code was not designed to provide a court-operated
23

24
25 ¹² Boone cites to In re Elias, 188 F.3d 1160, 1162 (9th Cir. 1999) and In re Menk, 241
26 B.R. 896, 906 (B.A.P. 9th Cir. 1999) in support of payment of his fees post-discharge. Elias
27 involved a Chapter 11 bankruptcy case that was dismissed. Menk involved a Chapter 7 case
28 being reopened for a creditor to challenge the dischargeability of a debt and a jurisdiction
issue. In Menk, the Ninth Circuit stated "[i]ssues of compensation and sanctions survive
dismissal." In re Menk, 241 B.R. at 906 (citing In re Elias, 188 F.3d at 1162). It is on this
statement that Boone relies. However, a case involving a dismissal is factually and legally
distinguishable from a case that was closed after the debtor obtained a discharge.

1 collection service available at the discretion of lawyers." Hanson,
2 223 B.R. at 779.

3 The \$6,000 in fees that Boone seeks were not previously submitted
4 to nor approved by the court. As an administrative expense they were
5 discharged under § 1328 when Ryder received her discharge. Under the
6 Hanson analysis they could only exist at this late date had they been
7 approved by the court and had Ryder entered into a reaffirmation
8 agreement prior to receiving her discharge. These events did not
9 occur.

10 **C. The Court's Due Process Concerns Have Been Satisfied.**

11 At a hearing prior to the hearing on this summary judgment
12 motion, the court raised a question about whether a Chapter 13
13 attorney is given sufficient notice that the case is about to be
14 completed and the debtor is about to obtain his or her discharge. The
15 Ninth Circuit has discussed notice for due process purposes and
16 concluded:

17 Whatever is notice enough to excite attention and put the party
18 on his guard and call for inquiry, is notice of everything to
19 which such inquiry may have led. When a person has sufficient
information to lead him to a fact, he shall be deemed to be
conversant of it.

20 In re Gregory, 705 F.2d 1118, 1123 (9th Cir. 1983) (citation omitted).

21 The Chapter 13 Trustee submitted a response to assist the court
22 in understanding how the progress of a Chapter 13 case can be
23 monitored. While the court believes every attorney should know the
24 status of his or her cases, the Trustee provides tools to assist
25 attorneys in this regard.

26 First, the Trustee's computer system is a resource. Once the
27 Trustee receives sufficient funds to complete all payments required
28

1 under a confirmed plan, the computer system is coded to show the case
2 status as "About to Complete." All parties to a Chapter 13 case have
3 access to the Trustee website to check the status of the case, which
4 will show whether a case is "About to Complete." After August 2002,
5 the website would have shown Ryder's case as "About to Complete."

6 There is a second resource. The Trustee also provides an annual
7 report to attorneys. In October 2002, the Trustee sent copies of
8 "debtors' annual reports to debtors' attorneys." The annual report
9 for Ryder would have shown that, but for the disputed claim of
10 American Business Leasing Inc., the case was ready to close.

11 Boone states in his declaration to his reply brief that:

12 The Chapter 13 Trustee asserts that we should have known that
13 the case was about to close because we could have checked the
14 trustee's website for a status report. We were simply awaiting
the outcome of the claim objection matter and it was clear that
the case would complete after the matter was resolved.

15 By this statement he appears to acknowledge that he knew the case
16 would close once the claim objection was resolved. What was required
17 of him at that point was not great, all he had to do was contact the
18 Trustee and let her know he was going to file a fee application.¹³
19 Because he did not act, the discharge was issued.

20 Finally, there is the Notice of Plan Completion that is filed and
21 sent to the attorney. After considering the trustee's explanation
22 regarding the closing process, and coupled with the fact that
23 attorneys should know the status of their cases, the court finds Boone
24 had sufficient notice that the debtor was about to complete her plan

25
26 ¹³ As the case comes to a close, the Trustee advises that it is her practice to hold
27 funds for payment of attorney fees if a debtor's counsel contacts her prior to the final
28 disbursement. She will hold an estimated amount of money for attorney fees upon the verbal
request of the attorney. If no attorney fee order is received within 30 days of the request,
the Trustee will contact the attorney to inquire about the status of the fee application.

1 and receive her discharge.

2 "When a debtor obtains a discharge, the debtor should be
3 confident that the debts provided for in the plan, including attorney
4 fees, have been satisfied." Hanson, 223 B.R. at 779 n.12. In this
5 case, the local requirements and forms implementing those requirements
6 are to assure that debtors are aware of the amount of fees and know
7 that those fees are to be paid through the plan. "Without such
8 disclosure and court approval, debtors may not be aware that, despite
9 having completed a three- to five-year plan, they may be liable for
10 a new debt to their Chapter 13 attorney." Id. This is precisely the
11 situation the court sought to avoid by implementing its guidelines and
12 procedures in this district.

13 **IV. CONCLUSION**

14 As the court has concluded that Boone's unapproved fees were
15 discharged when Ryder received her discharge, Boone's motion for
16 summary judgment must be denied. Given the court's conclusion, summary
17 judgment is granted in favor of Ryder based on her affirmative
18 defense.¹⁴

19 DATED: _____

20
21 _____
22 ¹⁴ Sua sponte entry of summary judgment is proper if "there is no genuine dispute
23 respecting a material fact essential to the proof of movant's case." Buckingham v. United
24 States, 998 F.2d 735, 742 (9th Cir. 1993) (citation omitted). However, a litigant must be
25 given reasonable notice that his or her claim will be in issue. Id. "Reasonable notice
implies adequate time to develop the facts on which the litigant will depend to oppose
summary judgment." Id. (citation omitted).

26 At the hearing on the motion for summary judgment, the court discussed that Ryder had
27 not brought a cross-motion for summary judgment motion on her affirmative defense that the
28 fees had been discharged. However, she had raised the issue as part of her opposition to
Boone's motion. The court asked the parties if they wanted the court to consider the issue
of whether the fees were discharged. The parties answered in the affirmative. The court
informed the parties they would have an opportunity to file any additional papers on this
issue; no such request was made.

UNITED STATES BANKRUPTCY COURT
For The Northern District Of California

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JAMES R. GRUBE
UNITED STATES BANKRUPTCY JUDGE

1 Adversary Proceeding No.04-5114

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6 UNITED STATES BANKRUPTCY COURT
7 FOR THE NORTHERN DISTRICT OF CALIFORNIA

8 CERTIFICATE OF SERVICE

9
10 I, the undersigned, a regularly appointed and qualified Judicial
11 Assistant in the office of the Bankruptcy Judges of the United States
Bankruptcy Court for the Northern District of California, San Jose,
California hereby certify:

12 That I, in the performance of my duties as such Judicial
13 Assistant, served a copy of the Court's: **MEMORANDUM OPINION** by
14 placing it in the United States Mail, First Class, postage prepaid,
at San Jose, California on the date shown below, in a sealed envelope
addressed as listed below:

15 I declare under penalty of perjury under the laws of the United
16 States of America that the foregoing is true and correct.

17 Executed on _____ at San Jose, California.

18
19 _____
LISA OLSEN

20 Devin Derham-Burk
21 Chapter 13 Trustee
P.O. Box 50013
22 San Jose, CA 95150-0013

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